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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Application of )  
Rainbow Broadcasting Company ) File No. BMPCT-910625KP  
For Extension of Construction )  
Permit for New UHF Television )  
Station on Channel 65, Orlando, )  
Florida )

DOCKET FILE COPY ORIGINAL

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION AND REINSTATEMENT AND GRANT  
OF APPLICATION FOR ASSIGNMENT OF CONSTRUCTION PERMIT

Pursuant to Section 1.106 of the Commission's Rules, Rainbow Broadcasting Company hereby requests reconsideration of the Bureau's denial, by letter of June 18, 1993 (Public Notice No. 1800E1-PRG, released June 28, 1993), of its above captioned request for extension of time to construct Station WRBW(TV), Channel 65, Orlando, Florida, the deletion of its call letters and the dismissal on grounds of mootness of its Form 316 application for pro forma assignment (File No. BTCCT-911129KT) to permit reorganization into a limited partnership. Rainbow respectfully suggests that those actions, granting the informal objections of market competitor Press Television Corporation, were based on a misapprehension of the facts; would disserve the public interest by precluding

early initiation of a new service; would work an extreme and wholly unmerited hardship upon Rainbow, which has diligently sought to bring service to Orlando since the filing of its original application in September 1982; and would deprive the Commission and the public of a 100% minority controlled television facility.

Background: Rainbow filed its Form 301 application for construction permit on September 9, 1992 (File No. BPCT-820909KF) and was the successful comparative applicant before the Commission. Although a construction permit was granted in October 1985,<sup>1/</sup> it was not until August 30, 1990 that judicial review of the grant was completed.<sup>2/</sup> After completion of judicial review, Rainbow sought a two year extension of its permit to construct.<sup>3/</sup> It was granted one extension for a six month

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1/ A chronology of the procedural events relating to Rainbow's authorization is set forth in Appendix A hereto.

2/ Notwithstanding the pendency of judicial review, Rainbow was required to file Form 307 requests for extension of time to construct. Consequently, three of the five extensions to which the Commission's June 18, 1993 letter alludes (pages 1-2) were granted while Rainbow's grant was under judicial review. Moreover, during part of that time even the Commission's own final order was suspended by a remand from the Court requested by the Commission, as reflected in Appendix A.

3/ Rule 73.3598 provides an original construction period of 24 months. Due to the protracted period of judicial review in the case of Rainbow's grant, Rainbow was effectively deprived of the normal two year construction

period. Its second request, filed on June 25, 1991, less than nine months after the completion of judicial review, was not considered for two years, until the June 18, 1993 denial. In the June 25, 1991 Form 307 request, Rainbow noted that it had commenced construction of its transmitter building and on November 27, 1991, Rainbow filed a supplement to its Form 307 informing the Commission that construction of the building "at a cost of approximately \$60,000" had been completed and that the permittee was still planning on a December 1992 operation date.

On the same day, Rainbow filed a Form 316 request to permit assignment of the construction permit to a limited partnership with Rainbow as the voting partner. In that request Rainbow, assuming timely consideration of the pro

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period. Thus, even though the 316 assignment application was filed within the normal 24 month initial period, the Commission treated it as though it had been filed after expiration of the allowable construction period. To deprive a permittee of the normal construction period simply because a losing competitor chooses to challenge the Commission's selection in court provides an unhealthy incentive to losing applicants to punish winners at public cost. Moreover, to provide less consideration to permittees who are put to the additional expense and delay of judicial review than is afforded other permittees is neither logical nor equitable. To be equitable, the Commission should either toll the initial construction period during judicial review or provide a 24 month period after the completion of judicial review. Had such a policy been followed in the case of Rainbow, the Form 316 application would not have been held in abeyance for more than 18 months and construction of the station would have been completed by December 1992.

forma assignment request, stated that it continued to plan on being operational by December 1992. No action was taken on the Form 316 assignment application until it was dismissed as moot in the Commission's June 18, 1993 letter.<sup>4/</sup>

Denial of Extension Request: The Commission's June 18, 1993 letter denying Rainbow's June 1991 request for extension was apparently based on its erroneous understanding that Rainbow had made no substantial effort or expenditure toward construction; that Rainbow had made a business judgment not to proceed with construction because of a dispute with the tower owner over the exclusivity of its transmitter location on the Bithlo tower; and that Rainbow was impermissibly relying upon the fact of the November 1991 filing pro forma assignment application as a circumstance beyond the applicant's control which prevented construction of the station. Given the misapprehensions on which it was based, Rainbow requests reconsideration of that action.

Facts Supporting Reconsideration: Contrary to the Commission's understanding, Rainbow has made substantial

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<sup>4/</sup> While arguably it could be said that action on the 316 request had to await action on the 307 extension request, the Commission's decision does not disclose any reason for the two year delay in acting on the June 1991 extension request.

effort and expenditure in furtherance of the construction of Station WRBW, Channel 65. Rainbow has paid out of pocket almost \$1 million in cash on expenses as of June 30, 1993, as follows:

Tower lease and related taxes/insurance 1986-present	\$ 499,815
Transmitter building construction	57,805
Engineering services	27,275
Professional fees (legal/accounting)	312,081
Organizational expenses	43,174
Broadcast consultants	<u>14,613</u>
TOTAL	\$ 954,763 <sup>5/</sup>

These expenditures demonstrate the seriousness of Rainbow's commitment to constructing and operating the facility. In fact, the only impediment to the early completion of construction is the necessity of favourable Commission action to permit the assignment of a valid construction permit to the Rainbow Limited Partnership--a circumstance that has remained unchanged since November 1991.<sup>6/</sup>

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5/ This amount represents actual out of pocket payments; it does not include other substantial funds already obligated.

6/ Contrary to the staff's apparent understanding (June 18, letter, footnote 3), Rainbow had demonstrated construction of the \$60,000 transmitter building in November of 1991 when the Form 316 was filed.

Similarly, as the Commission correctly notes, Rainbow's dispute with the tower owner did not materially delay construction. The preliminary injunction Rainbow sought was denied on June 6, 1991 and Rainbow proceeded with construction of the transmitter building immediately. See Statement attached to Form 307, File No. BMPCT-910625KP. To the extent the tower litigation is relevant to this proceeding, it serves only to reflect the seriousness of Rainbow's efforts to construct the station as proposed. Moreover, Judge Marcus' preliminary injunction decision did not reflect a rejection of the underlying action, which was subsequently remanded to state court.<sup>7/</sup> See Order appended hereto as Appendix B, page 3.

The assertion by Press Broadcasting, apparently accepted by the Commission, that Rainbow did not construct because it chose not to go forward in order to avoid sharing tower space with Press is both misleading and inaccurate. Press' tower lease requires it to relocate to the lower antenna aperture should its operation interfere with Rainbow's. See Press Tower Lease Excerpts,

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<sup>7/</sup> Rainbow and the tower owner have orally agreed to a settlement of the litigation whereby Rainbow will receive a cash settlement and other consideration. While the settlement agreement itself is proprietary, Rainbow will submit it to the Commission for examination in camera if the Commission believes it is germane to this request.

Appendix C hereto. While Rainbow believed its lease gave it exclusive use of the higher antenna aperture and had paid rent since 1986 to protect that higher antenna slot, Rainbow would have proceeded with construction during the tower litigation since Press would have been required to either move its antenna or protect Rainbow's operation in some other appropriate manner. The relevance of the Press/Gannett lease is that it provides Press with an incentive over and beyond the fact of its status as a competitor to impede Rainbow's efforts to get its station on the air.

The third basis for the Commission's denial of the extension request was its understanding that Rainbow relied upon the November 1991 filing of a pro forma assignment request as constituting an excuse under Rule 73.3534(b)(3) and that such an interpretation was contrary to the prior decision in *High Point Community Television, Inc.*, 2 FCC Rcd. 2506 (1987). It was not Rainbow's intention to claim that the filing of an assignment application triggered the exception reflected in Rule 73.3534(b)(3); nor is the *High Point* opinion relevant to Rainbow's situation.

Rainbow's claim to a Rule 73.3534(b)(3) exemption is that the Commission's failure to act on its pro forma

assignment request in the normal course (see footnote 4, *supra*) left the applicant unable to go forward and that such governmental inaction constituted a reason clearly beyond the applicant's control.<sup>8/</sup> Neither Rule 73.3534 nor the *Report and Order*, 102 F.C.C.2d 1054 (1985) by which that rule was adopted suggests that delay by governmental inaction excludes the F.C.C.<sup>9/</sup> To suggest that the Commission's failure to act in a timely manner on a timely filed request does not constitute good cause under Rule 73.3534(b)(3) is to suggest that if a permittee requested a 316 assignment within six months of its initial construction permit and the staff simply did not act on the request for two years, the construction permit could properly be cancelled for failure to construct within the

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8/ At the time Rainbow filed the 316 application, it had also demonstrated initial construction (see November 27, 1991 Supplement to Form 307) and had already expended over \$200,000 in tower lease payments. There was no reason that Rainbow should have anticipated undue delay in Commission action. Moreover, the Commission has previously held that grant of even a long form transfer or assignment application is unrelated to whether the station will actually be constructed. See *Sandino Telecasters*, 8 FCC Rcd. 2573 (1993).

9/ The requirement of the *Report and Order*, 102 F.C.C.2d 1054 (1985) that transfer or assignment applications be filed within the first 12 months after issuance of a television construction permit specifically excludes short form 316 applications. *Id.*, at n.6.



time allotted in Rule 73.3598. Obviously that is not the intention of the Commission's policy.

Finally, the cited *High Point* case is inapposite. In *High Point*, an applicant acquired a permit via transfer and was given 6 months extension to construct. At the end of the extension period the permittee advised that its transmitter site was no longer available, that it was not engaged in negotiations for a new site, and that while it had expended and obligated monies on construction and had some studio equipment on hand, it had lost its financing source. The Commission denied a further extension. A month after that extension denial, the permittee sought to assign its construction permit to an entity which it did not control and renewed its request for extension of time to construct. The staff denied the long form assignment and the extension, stating that extension applications would not be granted simply to permit an applicant to recoup out of pocket expenses and that the pendency of an assignment application would not support an extension request.

Unlike *High Point*, *Rainbow's* assignment request was a short form pro forma request and was timely filed. *High Point* stands for the proposition that a permittee cannot sit back and do nothing until the Commission

issues an adverse action and then seek to remedy its deficiencies. Unlike the *High Point* applicant, which lacked, by its own admission, both an antenna site and financing, Rainbow was at all times ready, willing and able to go forward; all it lacked was Commission permission to do so.

Rainbow's Proposal: Should the Commission reinstate Rainbow's Construction Permit, the following time schedule for construction and operation is anticipated:

<u>Time from Grant</u> <sup>10/</sup>	<u>Activity</u>
Within 30 days	Complete negotiations and execute contract for antenna (anticipate 4-5 months delivery).
Within 45 days	Complete negotiations and execute tract for transmitter and related equipment (anticipate 3-4 months delivery of transmitter; other equipment available within same period).
Within 60 days	Studio site lease negotiated and executed. Remodeling commences (anticipate completion within 6-8 weeks).
Within 90 days	Chief Engineer on payroll.
Within 120 days	Studio equipment installation commences (anticipate completion within 4-6 weeks). Technical staff will go on payroll when installation begins.

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10/ As previously reported to the Commission, the transmitter building at the Bithlo site has already been constructed and paid for by Rainbow. Electric power is already at the site and will be installed in the building as required by the construction schedule.

Within 150 days	Installation of transmitter/antenna and related equipment at Bithlo site (anticipate 4-6 weeks for installation).
Within 180 days	Nontechnical staff on payroll.
Within 200 days	Manufacturer's proof of equipment.
200-220 days	Program test and commence regular operations.

Rainbow has already selected equipment and concluded an agreement for equipment financing. The equipment list is attached hereto as Appendix D and the equipment finance agreement as Appendix E. In addition, the limited partnership funds of some \$2 million would be released upon completion of the transfer to the limited partnership.<sup>11/</sup>

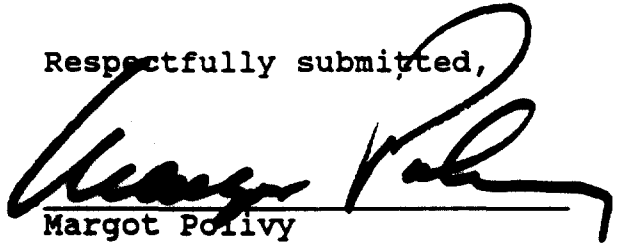
Conclusion: By information provided in this Petition, Rainbow has sought to demonstrate in greater detail its past and continuing commitment to construct and operate on Channel 65. Rainbow has already paid out close to \$1 million to retain its construction permit and antenna site and to commence construction. It is ready, willing and able to proceed with construction immediately upon favourable Commission action on this Petition and consequent grant of its request for extension of time to

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<sup>11/</sup> Contrary to Press' previous assertion, Rainbow is not relying upon funds from the litigation settlement for its financial qualifications.

construct (File No. BMPCT-910625KP) and reinstatement and  
grant of the Form 316 assignment application (File No.  
BTCCT-911129KT).

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Margot Polivy', is written over a horizontal line.

Margot Polivy  
RENOUF & POLIVY  
1532 Sixteenth Street, N.W.  
Washington, D.C. 20036  
202.265.1807

Counsel for Rainbow Broad-  
casting Company

2 July 1993

STATEMENT OF JOSEPH REY

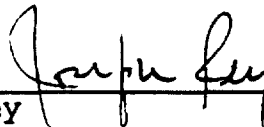
I am the General Partner of Rainbow Broadcasting Company. The statements contained in the attached Petition for Reconsideration are true and correct to the best of my knowledge and belief. The information regarding the expenditures, obligations, limited partnership status, and plans and projections of Rainbow was provided by me and reflects facts personally known to me and projections based upon my best judgment in light of the facts. All projections are based upon the assumption that the Form 316 assignment application (BTCCT-911129KT) is granted simultaneously with the grant of the Form 307 application (BMPCT-910625KP).

This statement is made under penalty of perjury.

Date

7/1/93

Joseph Rey



## **APPENDIX A**

# APPENDIX A

## CHRONOLOGY OF EVENTS AFFECTING RAINBOW CONSTRUCTION PERMIT

<u>Date</u>	<u>Action</u>
09.09.82	Rainbow application filed
10.18.85	Rainbow CP granted, FCC 85-558
11.18.85	Commission decision appealed to U.S. Court of Appeals, D.C. Cir., Case No. 85-1755
10. 86	F.C.C. requests remand after briefing
11.05.86	Court remands case to Commission
11.05.86	F.C.C. orders case held in abeyance pending review of minority preference policy, 1 FCC Rcd. 1315 (1986)
01.14.88	F.C.C. closes minority preference rule-making pursuant to Public Law No. 100-202 (1987) by Order, FCC 88-17
06.09.88	Rainbow proceeding returned to Court of Appeals for rebriefing
06.23.88	F.C.C. reinstates Rainbow Construction Permit; Form 701 filed 07.11.88, Public Notice #14221, 07.20.88
04.10.89	CP cancelled pursuant to Clay Pendarvis letter
04.21.89	U.S. Court of Appeals affirms Rainbow grant
05.10.89	Form 307 filed
05.15.89	CP reinstated, Public Notice #20582, released May 15, 1989
05.22.89	CP extended until 11.22.89
09.20.89	Petition for Writ of Certiorari filed in U.S. Supreme Court, Case No. 89-453
11.17.89	Form 307 filed

11.20.89	Opposition to cert filed in Supreme Court
11.30.89	CP extended until 05.30.89
03.28.90	Supreme Court grants certiorari, Case No. 89-453
05.30.90	Form 307 filed
06.29.90	Supreme Court affirms Rainbow grant
07.29.90	Request for Supreme Court rehearing, Case No. 89-453
07.31.90	Form 307 filed
08.30.90	Supreme Court denies request for rehearing GRANT NOW FINAL
10. 90	Tower litigation commenced-- preliminary injunction heard, Case No. 90-2554, So. District Florida
01.25.91	Form 307 filed
02.05.91	CP extended until 08.05.91
02.15.91	Press files informal objection to Rainbow CP extension request
02.25.91	Press seeks reconsideration of Rainbow CP extension
06.06.91	Preliminary injunmction denied in tower litigation
06.25.91	Form 307 filed; Rainbow commencing transmitter building construction; REQUEST NOT ACTED ON UNTIL 06.18.93 LETTER
11.27.91	Rainbow files Form 316 (pro forma transfer) to reorganize as limited partnership- no change in voting control
11.27.91	Rainbow files supplement to Form 307 extension request to reflect building construction



01.07.92 Press objects to Rainbow transfer request  
and seeks to hold it in abeyance; Rainbow  
responds 01.30.92

03.27.93 Pendarvis letter to show cause

04.12.93 Rainbow responds to Pendarvis

04.30.93 Press files "informal objections" to Rain-  
bow's authorization

05.13.93 Rainbow respnds to Press 04.30 93 filing

06.18.93 Staff letter denies Rainbow CP extension  
and dismisses transfer application as moot

## APPENDIX B

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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-2554-CIV-MARCUS

JOSEPH REY, et al.,  
 Plaintiffs,

ORDER OF REMAND

vs.

GUY GANNETT PUBLISHING CO.,  
 et al.,

Defendants.

JUN 5 1992  
 T. G. CHELOTIS  
 CLERK U. S. DIST. CT.  
 S.D. OF FLA.-MIAMI

THIS CAUSE is before the Court on Plaintiffs' Motion to Remand. For the following reasons, the motion is GRANTED.

Plaintiffs commenced this action for specific performance and injunctive relief on November 8, 1990, arising out of a dispute as to whether a contract between the parties provided for exclusive or non-exclusive use by Plaintiffs of certain antenna space atop the Gannett Tower. On June 20, 1991, this Court denied Plaintiffs' Motion for Preliminary Injunction, after a lengthy hearing, concluding that, among other things, at that stage in the litigation, the contract provided Plaintiffs with only non-exclusive use of the antenna slot. On September 27, 1991, the Court issued an Order Denying Plaintiffs' application to amend the findings of fact, but expressly added this caveat:

We observe, however, what is clearly delineated in that Order -- our ruling of June 20th did no more than deny a motion for preliminary injunctive relief. The Court did not consolidate the preliminary injunction hearing, nor was it presented with nor finally did it rule on a motion for final summary judgment filed by any party.

Order of Sept. 27, 1991 (emphasis in original). Plaintiffs were

subsequently granted leave to amend the complaint. In their Amended Complaint for Damages and Injunctive Relief, filed November 6, 1991, Plaintiffs have added a claim for money damages arising out the alleged breach of the lease agreement by Defendants Guy Gannett Publishing Co. ("Gannett") and MPE Tower ("MPE"), as well as a claim seeking money damages from both Defendants for fraud or negligent misrepresentation. Specifically as to MPE, Plaintiffs assert that, as a signatory to the lease agreement which underlies the claims for breach of contract, fraud, and misrepresentation, MPE is liable to the same extent as Defendant Gannett.

Plaintiffs now move to remand the action back to state court based on this Court's alleged lack of subject-matter jurisdiction. Specifically, Plaintiffs assert that full diversity of citizenship no longer exists, in that Plaintiffs Joseph Rey and Esperanza Rey-Mehr and Defendant MPE all are citizens of Florida. In response, Defendants argue that MPE is only a formal or nominal party to the lawsuit, that its joinder in the litigation is fraudulent, and that the addition of this party was designed and intended to defeat diversity jurisdiction. We disagree with Defendants' contentions, and accordingly we are constrained to Grant the Motion to Remand as this Court is without subject-matter jurisdiction.

At the outset, we observe that Defendant MPE is indeed, as Defendants must concede, a Florida corporation and therefore a Florida citizen for diversity purposes. See Pl. Mot. to Remand, Ex. 2. Since federal subject-matter jurisdiction requires complete diversity of citizenship between all plaintiffs and all defendants,

see 28 U.S.C. § 1332(a)(1), and since we find such diversity to be lacking here, the only remaining issue is whether Defendant MPE's presence in the lawsuit is the result of a "fraudulent joinder," done merely for the purpose of defeating diversity. In this regard, the United States Court of Appeals for the Eleventh Circuit has held:

In order to establish that a ... resident defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the resident defendant in state court or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts. Both parties may submit affidavits and deposition transcripts. The district court must evaluate all factual issues and questions of controlling substantive law in favor of the plaintiff. If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.

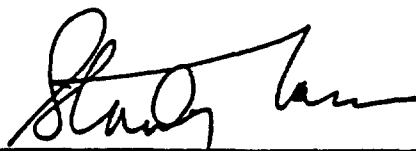
Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41 (11th Cir. 1983) (emphasis added). Here, Defendants argue that the Court, in denying Plaintiffs' Motion for Preliminary Injunction, has already concluded that no cause of action can be stated against Defendant MPE. We have, however, already observed that our Order of June 20th did no more than deny a motion for preliminary injunctive relief; it did not, nor could it, encompass a final resolution on the merits on Plaintiffs' claims. See Order of Sept. 27, 1991. We are thus unpersuaded by Defendants' primary argument in opposition to the instant motion.

Defendants also assert that, since MPE conveyed its interest in the transmission tower to co-Defendant Gannett in 1989, MPE

cannot be held liable for the subsequent alleged breach of the lease agreement to which MPE is a signatory. We cannot conclude, however, that, as a matter of law, see B., Inc. v. Miller Brewing Co., 663 F.2d 545, 554 (5th Cir. 1981), these facts negate "even a possibility" that a state court may find Defendant MPE liable to Plaintiffs. See 11 Fla. Jur. 2d § 79 (A contract "will be held binding upon those who do sign it.... A party cannot contradict his written contract by showing that notwithstanding he signed it, it was with the understanding that he was not to bound by its terms." (citing Coleman v. State, 174 So. 408 (1937); Bacon v. Green, 18 So. 870 (1895); 94 A.L.R.2d § 691 ("Person who signs contract but is not named in the body thereof [i]s party to contract and liable thereunder."))). We therefore conclude, taking the facts and law in the light most favorable to the Plaintiffs -- as we are required to do -- that there exists the possibility, based on the facts alleged in the Amended Complaint, that a state court could impose liability on Defendant MPE. The joinder of MPE was therefore not fraudulent, and accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for Remand is GRANTED.

DONE AND ORDERED at Miami, Florida, this 5<sup>th</sup> day of June, 1992.

  
\_\_\_\_\_  
STANLEY MARCUS  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record

## **APPENDIX C**

ADDENDUM TO LEASE AGREEMENT

ADDENDUM to Lease Agreement of even date by and between Guy Gannett Publishing Co., a Maine corporation with offices in Miami, Florida, doing business as Bithlo Tower Company ("Landlord"), and Press Broadcasting Company, a \_\_\_\_\_ corporation, with offices in \_\_\_\_\_ ("Tenant"):

W I T N E S S E T H:

WHEREAS, the parties hereto have executed, on even date herewith, a lease (the "Lease") which grants Tenant the right to lease space on Landlord's broadcast tower located in Bithlo, Florida (the "Tower"); and

WHEREAS, Landlord is party to a certain lawsuit filed by Rainbow Broadcasting Company ("Rainbow") which contests Landlord's ability to lease space on the Tower identified in the Lease without violating Rainbow's claimed rights under its lease with Landlord dated December, 1985 ("Rainbow Lease");

WHEREAS, Rainbow has been denied a preliminary injunction which sought to restrain Landlord from permitting Tenant's location at approximately the 1500 foot level of the Tower, but has nevertheless indicated it plans to proceed with the litigation; and

WHEREAS, Landlord and Tenant have agreed that Tenant's rights under the Lease shall be subject to whatever might result from any pending and future Rainbow litigation against Landlord;

NOW, THEREFORE, Landlord and Tenant hereby mutually agree, that the Lease be and the same hereby is amended as follows:

1. Agreements With Respect to Risks Associated With Rainbow Litigation

Tenant is fully aware of the pending Rainbow lawsuit described above and of Rainbow's stated determination to proceed with such litigation until its "rights have been vindicated" (See letter from Michael Nachwalter dated June 17, 1991 attached hereto as Exhibit A). Tenant further acknowledges that Rainbow may modify its claims in the pending lawsuit or file additional actions contesting Landlord's right and ability to comply with its obligations under the Lease or alleging breach of the Rainbow Lease by reason of the Lease with Tenant or covenants or agreements contained therein. Tenant also acknowledges that actions by Rainbow are wholly beyond the power of Landlord to



anticipate or control and has been advised that Landlord will not agree to any compromise with Rainbow.

In consideration of and as an inducement to Landlord's entry into the Lease, Tenant hereby agrees that all costs, expenses and losses (direct or indirect, including but not limited to costs, damages, expenses and losses associated with any delay in Landlord's performance under the Lease or the loss, modification or curtailment of Tenant's rights under the Lease) experienced or incurred by Tenant (a) in connection with, or related to, litigation, administrative proceedings or other actions brought by, through or under Rainbow, its partners or the successors or assigns of either against Landlord or Tenant contesting Landlord's right to lease space to Tenant or the utilization of Landlord's Premises by Tenant, including without limitation actions contesting (i) either party's right to enter into the Lease, (ii) the location of Tenant's equipment on the Tower or elsewhere on Landlord's Premises or the construction of the Transmitter Building addition for Tenant's equipment, or (iii) preventing Landlord from fulfilling any of its other obligations under the Lease or from permitting Tenant to exercise any of its rights thereunder (hereafter "Rainbow Actions"), (b) arising or resulting from termination of the Lease as hereafter provided, or (c) arising or resulting from any and all delays in final resolution and execution of the Lease since the date on which Rainbow first threatened to attempt to prohibit Tenant's location on the 1500 foot level of the Tower, shall be the sole and separate responsibility of Tenant.

Any failure of Landlord to perform its obligations under the Lease by reason of a Rainbow Action shall be deemed excused, Landlord shall have no liability therefor and shall not be deemed to be in breach of its obligations under the Lease. For so long as any Rainbow Action prevents Landlord's performance under the Lease, Landlord's time for performance of any obligations so delayed shall be extended accordingly.

All of Landlord's representations, warranties and covenants in the Lease, express or implied, including but not limited to the covenant of quiet enjoyment, are hereby qualified accordingly.

## 2. Termination Rights.

A. Landlord shall have the right to terminate the Lease upon written notice to Tenant in the manner provided in the Lease in the event that:

(i) Landlord is enjoined, restrained or otherwise prohibited by a Rainbow Action from permitting the placement of Tenant's equipment at the height level on the Tower or at the